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December 19, 1996

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-45

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of Bell Atlantic NYNEX Mobile, Inc., are an original and four copies of its "Comments" on the Recommended Decision of the Federal-State Joint Board in the above-referenced proceeding. In addition, a diskette containing these Comments is being provided to Ms. Sheryl Todd of the Common Carrier Bureau with a copy of this letter.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

cc: Ms. Sheryl Todd

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 29554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	

COMMENTS OF BELL ATLANTIC NYNEX MOBILE, INC.

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Its Attorneys

Dated: December 19, 1996

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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COMMENTS OF BELL ATLANTIC NYNEX MOBILE, INC.

Bell Atlantic Nynex Mobile, Inc. ("BANM") hereby submits its comments on the Federal-State Joint Board's Recommended Decision in this proceeding.[1]

I. SUMMARY

Section 254 of the Telecommunications Act of (1996) ("1996 Act") directs the Commission to adopt rules implementing Sections 214(e) and 254, following the issuance of recommendations by a specially-convened Federal-State Joint Board ("Joint Board"). While BANM believes that a number of the proposals in the Board's Recommended Decision are well-founded and further the policies underlying Section 254, it disagrees with two aspects of that decision.

First, the Board's decision that CMRS providers must contribute to state universal service funding mechanisms was improper and unlawful because it is beyond the scope of this proceeding, exceeded the Board's authority, and was also

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[1] Recommended Decision, FCC 96J-3, released November 8, 1996. This decision was issued pursuant to the Notice of Proposed Rulemaking and Order Establishing Joint Board, CC Docket No. 96-45, FCC 96-93, released March 8, 1996 ("NPRM").

wrong on the merits. Indeed one court has already held that Section 332(c) of the Communications Act bars states from subjecting CMRS providers to universal service contributions. The Commission must reject the Board's finding.

Second, the Board's proposal that the federal universal service program be funded through contributions based on revenues net of payments to other carriers, and that intrastate as well as interstate revenues be taxed for at least some parts of the program, is unlawfully discriminatory and inconsistent with the Act. The Commission should instead adopt a mechanism that bases contributions on carriers' retail interstate revenues.

II. THE BOARD'S DECISION THAT CMRS PROVIDERS CAN BE REQUIRED TO CONTRIBUTE TO STATE PROGRAMS WAS PROCEDURALLY UNLAWFUL AND WRONG ON THE MERITS.

While nearly all of the Recommended Decision addressed the federal universal service program, at one point the Board went beyond the federal program to opine as to the permissible scope of funding mechanisms for state programs. The Board concluded (at ¶ 791) that "section 332(c)(3) does not preclude states from requiring CMRS providers to contribute to state support mechanisms." The Commission had provided no notice that this issue would be considered by the Board, and had in fact expressly not referred to the Board issues relating to state programs. The Board thus failed to comply with administrative law requirements of adequate notice to interested parties, and also exceeded the scope of its authority. In any event, the Board's conclusion was wrong on the

merits. The Communications Act bars states from obligating CMRS providers to contribute to a state's universal service program until they become a substitute for a substantial portion of the landline service in that state.

A. The Board's Action Exceeded Its Authority And Was Not Preceded By Adequate Notice.

Joint Board proceedings, like other rulemaking proceedings, are governed by administrative law principles, including the requirement that the agency provide notice "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process."[2] There was no mention anywhere in the NPRM that the Commission intended to take up the issue of whether states could tax CMRS providers for contributions to state universal service programs, or that it was directing the Board to do so. To the contrary, the Commission explicitly stated in the NPRM (at ¶ 12) that is was not addressing or referring to the Joint Board any issues relating to the adoption and administration of state universal service funds:

> We do not address Sections 254(f), 254(g), or the last sentence in Section 254(k) in this Notice, nor do we refer issues relating to them to the Federal-State Joint Board convened by this Order. Section 254(f) is directed to the states and to what they may or may not do to advance universal service goals.

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[2] Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C. Cir. 1988); see also Reeder v. FCC, 865 F.2d 1298 (D.C. Cir. 1989). Cf. Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings, 63 RR 2d 1275, 1281 (1987) ("Joint Board proceedings ordinarily are in the nature of rulemakings").

The Joint Board's finding on Section 332(c)(3) was responding to the comments of a few parties which expressed views on the application of state programs to CMRS providers and the effect of that statutory provision. However, the fact that several parties (five out of over 200) mentioned this issue does not cure the inadequacy of the notice given and thus the illegality of the Board's finding.[3]

The 1996 Act confirms that Congress did not intend this proceeding to address Section 332(c)(3) or the relationship between CMRS providers and state universal service programs. This proceeding was initiated at the direction of Congress to develop a comprehensive new federal universal service program. The provision in the 1996 Act that authorizes creation of the Joint Board, Section 254(a)(1), references only the federal universal service program.[4] Moreover, the legislative history of Section 254 clearly indicates that Congress intended the Joint Board's focus to be on federal, not state, universal service issues.[5]

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[3] MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (rejecting Commission's claim that inadequate notice was alleviated by parties' comments during the rulemaking).

[4] Section 254(a)(1) authorizes the Commission to institute a Federal-State Joint Board, and refer to it a proceeding to "recommend changes to any of [the Commission's] regulations in order to implement sections [sic] 214(e) and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations." 47 U.S.C. § 254(a)(1).

[5] The Conference Committee report on the 1996 Act stated that the provision authorizing creation of the Joint Board directed the Joint Board to "thoroughly review the existing system of Federal universal service support." S. Rep. No. 230, 104th Cong., 2d Sess. 131 (1996) (Joint Explanatory Statement) (emphasis added).

The Joint Board thus improperly exceeded its authority by addressing states' ability to tax CMRS providers for state universal service programs, and the Commission cannot lawfully adopt that position.

B. The Board Incorrectly Ignored The Direction of Section 332(c)(3).

The Joint Board compounded its procedural error by reaching the wrong conclusion on the merits. The Joint Board cites no factual or legal support for its conclusion that Section 332(c)(3) does not exempt CMRS providers from contributions to state universal service fund programs until those providers are a substantial substitute for landline service. Nor does it address any of the arguments raised by commenters as to why Section 332(c)(3) bars such contributions.[6] The Joint Board's single, conclusory sentence in ¶ 791 fails even to address, let alone rebut, the arguments of the commenters that Section 332(c)(3) does apply. Its decision on this point is thus arbitrary and capricious because it fails to set forth a "reasoned determination" as to how or why it reached this legal conclusion."[7] In any event, the Board's interpretation of the Communications Act is incorrect.

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[6] See CTIA Comments at 5-8; PCIA Comments at 10-12; AirTouch Comments at 3-4; MobileMedia Comments at 3-12; Reed Smith Comments at 3-7; PCIA Reply Comments at 7-9. Recommended Decision at ¶ 783.

[7] City of Brookings Municipal Telephone Co. v. FCC, 822 F.2d 1153, 1168 (D.C. Cir. 1987) (reversing FCC order which failed to illuminate the reasons for agency's decision); see also Celcom Communications Corp. v. FCC, 789 F.2d 67, 71 (D.C. Cir. 1986) ("[T]he agency must consider the relevant evidence presented and offer a satisfactory explanation for its conclusion.").

In the 1993 Budget Act,[8] Congress amended Section 332 of the Communications Act and radically changed the legal framework governing CMRS providers. New Section 332 generally removed state authority to regulate the entry or rates of CMRS providers and established a federal regulatory scheme for governing CMRS.[9] Moreover, in Section 332(c)(3), Congress explicitly addressed the applicability of state universal service support obligations to CMRS providers:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

Under this provision, a CMRS provider is subject to state universal service support obligations only where the CMRS provider has been found to be a "substitute" for a land line carrier for a "substantial" portion of a state's communications traffic.

Section 332(c)(3) codifies Congress' finding that preemption of most state regulation of CMRS would "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of

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[8] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312 (1993) (amending, *inter alia*, the Communications Act of 1934) (the "1993 Budget Act").

[9] H.R. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) ("Conference Report") (intent of Section 332(c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of all commercial mobile services").

the national telecommunications infrastructure."[10] Congress decided that CMRS providers should accordingly not be regulated like land line providers, including with respect to universal service, until they become a "substitute for land line telephone exchange service for a substantial portion of the communications" within a state. Section 332(c)(3).

In enacting Section 254 of the 1996 Act, Congress did not revoke Section 332(c)(3)'s preemption of state authority to impose universal service obligations on CMRS providers. Nothing in the 1996 Act explicitly repeals Section 332(c)(3). In fact, Section 601(c)(1) of the 1996 Act provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments."[11] To interpret Section 254(f) as repealing Section 332(c)(3) is contrary to both the explicit language of the 1996 Act in Section 601(c), as well as well-established principles of statutory construction that disfavor the repeal and amendment of laws by implication.[12]

Moreover, Section 253(e) suggests that Congress did not intend to repeal Section 332(c)(3) by passage of Section 254. Section 253 addresses the issue of removal of state-erected barriers to entry. Subsection (b) of that provision clarifies

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[10] H.R. Rep. No. 111, 103rd Cong. 1st Sess. 260 (1993) ("House Report").

[11] Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (1996).

[12] See, e.g., United States v. Welden, 377 U.S. 95, 103 n.12 (1964); Cheney R.R. Co. v. Railroad Retirement Bd., 50 F.3d 1071, 1078 (D.C. Cir. 1995); Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 318 (D.C. Cir. 1988).

that state universal service requirements that are consistent with Section 254 are not considered barriers to entry. Subsection (e) of that provision provides that "[n]othing in this section shall affect the application of 332(c)(3) to commercial mobile providers." Taken together, sections 253(b) and 254 outline the general authority of the states to create universal service obligations, but this general authority is limited by the specific restriction found in Section 332(c)(3).

The Board suggests (although it does not explicitly say) that Section 254(f) entitles states to compel CMRS providers to contribute to state programs. Section 254(f), however, is not inconsistent with the preemption provision of Section 332(c)(3). Section 254(f) provides that the states have authority to adopt universal service rules, so long as such rules are "not inconsistent with" the Commission's rules. Section 332(c)(3) merely imposes another limitation on state authority to adopt universal service rules -- not only must such rules be consistent with federal rules, they may not be generally applicable to CMRS providers. Only those CMRS providers whom the Commission has determined provide services that are "a substitute for land line telephone exchange service for a substantial portion of the communications" within the state can be subject to state universal service rules.

Even if Sections 254 and 332(c)(3) could be construed to be inconsistent, Section 332(c)(3) would govern, under the well-established principle that where a statutory provision is explicit on a particular issue, the explicit language takes

precedence over a later enacted but more general provision.[13] The specific, CMRS-related preemption established by Section 332(c)(3) is thus unaffected by the general authority granted the states in Section 254(f).

One court has recently interpreted Section 332(c)(3) in a manner directly contrary to the Board's position, holding that this statute prohibited a state public utility commission from imposing state universal service payment obligations on CMRS providers unless and until they become a substantial substitute for landline service.[14] In that case, the Connecticut Department of Public Utility Control (DPUC) had ordered that cellular businesses in Connecticut would be subject to the state's universal service and lifeline program funding obligations. BANM's Metro Mobile systems in Connecticut appealed, and the court reversed the DPUC. After reviewing the language and legislative history of Section 332, the court concluded:

> By expressly exempting from preemption those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption. Accordingly, it is held that the Budget Act preempts the DPUC from assessing Metro Mobile for payments to the Universal Service and Lifeline Programs. (Slip Op. at 7-8.)

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[13] See, e.g., Simpson v. United States, 435 U.S. 6, 15 (1978); Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976); Morton v. Mancari, 417 U.S. 535, 550-51 (1974).

[14] Metro Mobile CTS, Inc. v. Connecticut Dep't of Public Utility Control, No. CV-95-0051275S (Conn. Super. Ct., December. 9, 1996).

III. THE COMMISSION SHOULD ADOPT A FUNDING MECHANISM BASED ON INTERSTATE RETAIL REVENUES.

BANM agrees with the Joint Board that the Commission should adopt "competitive neutrality" as an additional principle upon which to base its universal service policies. Recommended Decision at ¶ 15. Only by adopting competitively neutral rules will the Commission ensure that all interstate carriers will be contributing to universal service support mechanisms on an "equitable and nondiscriminatory" basis, as Section 254(d) requires.

However, in order to be consistent with principles of competitive neutrality, the Commission must reject the Joint Board's recommendation of a gross interstate and intrastate revenues base net of payments to other carriers. Recommended Decision at ¶ 807). It should instead adopt rules that base federal universal service fund contributions on retail interstate telecommunications revenues.

The "gross revenues net payments to other carriers" approach recommended by the Joint Board severely disadvantages carriers which provide service wholly or predominantly over their own facilities. Payments to other carriers will make up only a very small portion of those carriers' costs of doing business, effectively subjecting them to a "gross revenues" payment obligation. In contrast, for resellers and other carriers who predominantly use the facilities of others, payments to other carriers will be a very large portion of their cost of operating. Were the Joint Board's approach adopted, those carriers would contribute based only on what is their profit margin. BANM, for example, would not be able to net

out of the revenue base that is subject to universal service payments the costs to build and maintain its cellular network, while BANM's resellers would be able to net out their payments to BANM, even though those payments are effectively a substitute for building their own networks.

A "net payments to other carriers" system would thus penalize those carriers who invest in their own facilities, and reward those who do not. This would discourage entrants from building new facilities, contrary to the public interest in encouraging new infrastructure. Such a divergent result is also unlawfully discriminatory, contrary to the direction of Section 254 and to Commission policy to ensure that competition is not distorted by disparate regulation.[15]

In contrast, basing contributions on retail revenues would treat all providers, facilities-based and non-facilities-based, in a competitively neutral way. All providers of telecommunications services would contribute in proportion to the number of customers they serve. Moreover, calculating retail revenues (and monitoring the same) would be no more difficult for carriers and the Commission than calculating either gross revenues or payments to other carriers.

The Board also erred in proposing that universal service support for schools, libraries and rural health care providers be funded by assessing not only the inter-

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[15]Section 332 of the Communications Act requires the Commission to regulate providers of similar commercial mobile radio services consistently. "Regulatory symmetry" has been established by the Commission as a cardinal principle for CMRS regulation. See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1488 (1994). The Joint Board does not address, let alone demonstrate, why its proposed funding approach would comply with the principle of regulatory parity. It would not.

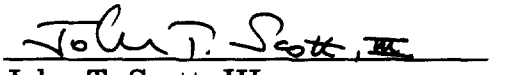
state but also the intrastate revenues of interstate service providers. Recommended Decision at ¶ 817. Contributions to the federal universal service fund can lawfully be assessed only on interstate revenues. Nothing in the language or legislative history of Section 254 suggests that Congress intended the federal universal service program to be supported by contributions from intrastate revenues, and such a decision would constitute unlawful overreaching. Congress had previously created the Telecommunications Relay Service (TRS) program, codified in Section 227 of the Communications Act, which was also designed to serve general public interest objectives by assisting hearing-impaired and speech-impaired persons. That provision, and the Commission's implementing regulations, based the federal TRS fund only on carriers' interstate revenues. See 47 CFR § 64.604(c)(4). Congress gave no indication in the 1996 Act that it wanted the sharply different approach recommended by the Joint Board of having the Commission collect from both intrastate and interstate revenues. The Commission should, as with the federal TRS program, finance the federal universal service fund from contributions based on carriers' interstate revenues only.

IV. CONCLUSION

For the reasons set forth herein, BANM urges the Commission to reject the Joint Board's position that Section 332(c)(3) does not exempt CMRS providers from state universal service fund obligations. CMRS providers are, under Section 332(c)(3) of that Act, exempt from payment obligations at this time. In addition, the Commission should adopt a mechanism to fund the federal universal service program based on carriers' retail, interstate telecommunications revenues.

Respectfully submitted,

BELL ATLANTIC NYNEX MOBILE, INC.

By: 

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Dated: December 19, 1996

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CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of December, 1996, caused copies of the foregoing "Comments of Bell Atlantic NYNEX Mobile, Inc." to be sent by first-class mail, postage prepaid, to each of the persons identified on the attached Service List.

John T. Scott, III

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